IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K. HEMA

FRIDAY, THE 4TH AUGUST 2006 / 13TH SRAVANA 1928

CRL. A. No. 271 of 2006

AGAINST THE JUDGMENT/ORDER IN CRLP. 67/2006 Dated 31/01/2006
ST. 1025/2003 of JUDL. MAGISTRATE OF FIRST CLASS COURT, OTTAPPALAM

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APPELLANT/COMPLAINANT:

K. BABY, S/O. PANACHIRA VEETTIL
AGASTHI, KADAMPAZHIPPURAM AMSOM,
OTTAPPALAM TALUK.

BY ADV. SRI. PHILIP T. VARGHESE
SRI. THOMAS T. VARGHESE
SMT. ACHU SUBHA ABRAHAM

RESPONDENTS/ STATE AND ACCUSED:
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1. **STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

2. **P. N. JOSEPH, S/O. MATHEW, PARAPPURATH VEEDU, P.O. KOZHA, KURAVILANGAD, KOTTAYAM.**

BY ADV. SRI. C.C. THOMAS
BY PUBLIC PROSECUTOR SRI. K. J. GEORGE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04/08/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. HEMA, J.

CRA. NO. 271 of 2006

Dated this the 4th day of August, 2006

J U D G M E N T

Can a Magistrate acquit an accused under Section 256(1) of the Code of Criminal Procedure (the Code, for short) in cases where complainant has adduced part of evidence ? This is the short question which comes up in this appeal.

2. The appellant filed a complaint against the second respondent, alleging offence under Section 138 of the Negotiable Instruments Act. The case was posted for evidence but, the complainant was absent and hence, the accused was acquitted under Section 256(1) of the Code. The appellant challenges the said order of acquittal in this appeal.

3. A reading of the order under challenge would go to show that the accused entered appearance, substance of accusation was read over to him and he pleaded not guilty. Thereafter, the case was adjourned from time to time and ultimately, appellant-complainant filed an affidavit in lieu of chief examination. Exhibits P1 to P6 were also marked. Thereafter, the complainant remained absent on several postings. The court, therefore,

acquitted the accused under Section 256(1) of the Code, on the day on which the case for posted for evidence of complainant.

4. Section 256 of the Code of Criminal Procedure reads as follows:

> ***"Non appearance or death of complainant -*** (1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:
>
> Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.
>
> (2) The provisions of subsection (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death".

5. A reading of the Section 256(1) of the Code shows that the accused can be acquitted for non-appearance of complainant, only if such non-appearance occurs on the days specified in the section. Such days are, (i) the day appointed for appearance of the accused or ii) any day subsequent thereto, to which the case is adjourned for hearing. The accused cannot, therefore, be

acquitted for non-appearance of the complainant under Section 256(1) of the code, on the day to which the case is posted for evidence of the complainant under Section 254 of the Code.

6. The case has crossed the stage of “hearing” referred to in Section 254 of the Code and it has gone to the next stage of adducing evidence. Hence, in cases where the complainant has adduced at least part of his evidence under Section 254 of the Code, the court has no jurisdiction to acquit the accused under Section 256(1) of the code for non-appearance of complainant. After recording of plea of the accused, if the Magistrate proceeds to hear the prosecution and take all such evidence as may be produced in support of the prosecution etc., under Section 254 of the Code, and the Magistrate finds the accused not guilty, he shall acquit the accused only under Section 255 of the code. In cases where prosecution adduced at least part of evidence as stated in Section 254 of the Code, the court can proceed only under Section 255 of the Code and not under Section 256 of the Code, even if the complainant is absent. The court shall not take re-course to any short-cuts to acquit the accused under Section 256(1) of the code, once it has proceeded under Section 254 of the Code.

6. It is pertinent to note that though Section 254 of the Code contemplates a proceeding for "hearing" as well as "evidence", Section 256 refers to only day of "hearing" as the crucial day and not the day to which the case is posted for "evidence". It is needless to say that "hearing" and "evidence" are distinct and different. Those cannot be understood to mean the same events. Otherwise, there is no reason why legislature used both these expressions distinctly in Section 254 itself and it included only day of "hearing" and not "evidence" in Section 256. Had the legislature intended to include the day for "evidence" also within the purview of Section 256 of the Code, this could have been easily done. But, having not chosen to do so, it has to be inferred that there must be clear-cut intentions behind for the legislative to do so. It cannot be viewed as a mere omission.

7. In such circumstances, Section 256(1) of the Code can be invoked to acquit the accused only on the day appointed for appearance of the accused under Section 251 of the code or on any day subsequent thereto to which the "hearing" of the case is adjourned, which is referred to in Section 254 of the Code and not on any other day to which the case is posted for evidence.

8. These facts will be evident from another fact also. A printed form is made available for issuing an order under Section 256(1) of the Code. Form No. 11 prescribes the form for issuing order under Section 256(1) of the code. A perusal of the said form shows that the relevant days on which the court can acquit the accused are, i) the day appointed for appearance of the accused or ii) any day subsequent thereto to which the case is adjourned for hearing. It does not refer to the day to which the case is posted for evidence. This also gives an indication that the accused cannot be acquitted Section 256 of the code on any day other than those which are not specified therein.

9. Now, coming to the facts of this case, I find that stage of evidence has already begun. Evidence is partly adduced. Thus, the day for hearing is already over. The case has gone to the next stage and evidence is adduced in part under Section 254 of the Code. So, having entered the stage of evidence, under Section 254 of the Code, the course open to the Magistrate is to proceed under Section 255 and not to acquit the accused under Section 256 of the Code. So, the impugned order of acquittal passed under Section 256(1) of the Code is without jurisdiction and highly illegal.

10. Hence, the order under challenge is set aside. The learned Magistrate is directed to take S.T. No. 1025/2003 on file and dispose of the case in accordance with law. Parties shall appear before the trial court on notice to their counsel.

This appeal is allowed.

K. HEMA, JUDGE

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